

STATE OF VERMONT BOARD OF MEDICAL PRACTICE

In re: David P. Nichols, M.D.

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Docket No. MPC 86-0505

STIPULATION AND CONSENT ORDER

NOW COME the State of Vermont, by and through William H. Sorrell, Attorney General, and James S. Arisman, Assistant Attorney General, and David P. Nichols, M.D., Respondent in the above-captioned matter, and agree and stipulate as follows:

1. The Vermont Board of Medical Practice (hereinafter "Board") possesses jurisdiction to investigate complaints of unprofessional conduct pursuant to 26 V.S.A. § 1353. The Board has jurisdiction to discipline licensees pursuant to 26 V.S.A. §§ 1353, 1355, 1361, & 1398.

2. Respondent was first licensed as a medical doctor by the Vermont Board of Medical Practice on April 5, 1995 and holds license number 042-0009079. Respondent, an orthopaedic surgeon, practices in Lockport, New York. Respondent does not presently practice in the State of Vermont.

I. Background.

3. The above-captioned matter was opened by the Vermont Board of Medical Practice on or about May 25, 2005, following receipt of information that Respondent was the subject of a consent order (BPMC No. 05-100) entered by the New York State Board for Professional Medical Conduct. The consent order, entered pursuant to § 230-a(3) of the Public Health Law of the State of New York, permanently restricted Respondent from performing nerve conduction studies. The consent order

also placed Respondent on probation for a period of at least 36 months and imposed other conditions, including a requirement for practice monitoring.

4. Respondent agreed in the consent order entered by the New York State Board for Professional Medical Conduct that he had performed “inadequate nerve conduction studies” on patients on more than one occasion in 1998 and 1999.¹ Respondent provided the following statement regarding his treatment of four specific patients, who were the subject of the New York State action:

These patients had nerve conduction studies done by me in my office to help confirm the diagnosis of carpal tunnel syndrome or ulnar nerve compressive neuropathy in the upper extremity. All testing was done using the joint guidelines of The American Association of Electrodiagnostic Medicine, The American Academy of Neurology, and The American Academy of Physical Medicine and Rehabilitation. . . .²

5. Respondent’s position is that none of the subject patients experienced an adverse outcome. Respondent, however, agrees here that he entered into the consent order with the New York State Board for Professional Medical Conduct in early 2005. He has stated that he did so, on advice of counsel, to minimize uncertainty, risk, and costs and the loss of additional time from his practice.

6. Respondent has determined that he wishes to provide certain assurances and voluntarily to enter into certain conditions of licensure with the Vermont Board.

II. Agreement of the Parties.

7. Respondent has cooperated fully with the Vermont Board of Medical Practice and has communicated with investigative staff of the Vermont Board and the Office of the Vermont Attorney

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1. The New York State consent order does not provide details specifying the deficient character of the “inadequate nerve conduction studies” that Respondent is alleged to have performed.

2. Respondent also has asserted, “After extensive review by myself, another orthopedic surgeon and a physiatrist experienced in performing nerve conduction studies no deficiency was identified in my performance of these studies.”

General. Respondent wishes to resolve the matter now under review by the Vermont Board by entering into this Stipulation and Consent Order, to achieve a resolution acceptable to the parties while minimizing uncertainty and the costs to all concerned.

A. Conditioned Vermont Medical License.

8. Respondent agrees that his Vermont medical license shall be designated as “conditioned” and that he shall abide by the following conditions until he has been expressly relieved of all these in writing by the Vermont Board of Medical Practice.

B. Incorporation of New York Agreement.

9. Respondent expressly agrees here that he shall comply fully with all terms and conditions³ set forth in his 2005 consent agreement with the New York State Board for Professional Medical Conduct and shall do so until such time as he is expressly relieved of all these terms and conditions in writing by the New York Board.

10. Respondent agrees that the instant agreement with the Vermont Board of Medical Practice, shall incorporate by reference, as integral elements of this Stipulation and Consent Order, all terms and conditions of his 2005 consent agreement with the New York State Board for Professional Medical Conduct (attached hereto as Exhibit 1). Respondent agrees that such incorporation of terms expressly includes any and all content, conditions, and requirements as already imposed upon Respondent’s medical license by the New York Board. Consistent with such conditions and requirements, Respondent acknowledges that principal oversight and monitoring of his medical practice and compliance status shall be by the New York State Board for Professional Medical Conduct.

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3. Respondent acknowledges that the 2005 consent agreement with the New York Board includes a provision permanently restricting him from performing nerve conduction studies.

11. Respondent expressly acknowledges and agrees that the instant agreement with the Vermont Board of Medical Practice constitutes a separate agreement between himself and the Vermont Board, and is in addition to his existing consent agreement with the New York State Board for Professional Medical Conduct.

12. Respondent agrees that he shall sign any and all releases or waivers of confidentiality that may be required by the Vermont Board of Medical Practice, its employees and agents, and/or the Office of the Vermont Attorney General so as to permit them to obtain information and records related to his compliance with the terms and conditions imposed by his agreements with the New York and/or the Vermont boards. Respondent agrees he shall be responsible for taking reasonable steps to ensure that copies of all reporting and/or other information required by his agreement with the New York State Board for Professional Medical Conduct shall be promptly forwarded to the Vermont Board of Medical Practice for review and inclusion in his Vermont Board file.

C. Medical Practice in Vermont.

13. Respondent agrees that he presently does not practice medicine in the State of Vermont. Respondent agrees that until the required period of probation imposed by his 2005 consent agreement with the New York Board has been formally terminated in writing by that agency, his practice of medicine shall be limited to states of licensure other than Vermont.

14. Respondent agrees he shall provide the Vermont Board of Medical Practice at least 60 days notice prior to any commencement of practice activities in this State. Respondent agrees that at any time, but particularly in the event he determines that he intends to practice medicine in this State, the Vermont Board of Medical Practice may and shall review any and all information and records related to his compliance with his 2005 consent agreement with New York State Board for Professional Medical Conduct. Respondent agrees to make reasonable efforts to facilitate the prompt

disclosure of all such information to the Vermont Board of Medical Practice for purposes of permitting monitoring and/or review of his compliance with his practice agreements.

15. Respondent agrees that he shall not petition for modification of this agreement with the Vermont Board of Medical Practice until such time as the New York State Board for Professional Medical Conduct has terminated all terms of probation that were placed upon his New York medical license by his 2005 consent agreement with the New York Board. Respondent acknowledges and agrees that he shall bear the burden of proof and persuasion with regard to any such petition to the Vermont Board and that the Board shall possess sole discretion to decide any such petition. The Vermont Board's decision shall be final and unappealable.

III. Implementation and Other Matters.

16. Respondent agrees with the facts set forth above in paragraphs 3 through 8, above, and paragraph 17, immediately below. Respondent agrees that the provisions and conditions his 2005 consent agreement with the New York State Board for Professional Medical Conduct constitute grounds for the Vermont Board of Medical Practice to condition Respondent's license to practice as a physician in this state, and to impose the conditions set forth herein on his Vermont license to practice medicine. Thus, Respondent agrees and consents that the Board of Medical Practice may adopt and enter as its findings and/or conclusions this paragraph as a basis for this agreement.

17. Respondent acknowledges that he knowingly and voluntarily is agreeing to this Stipulation and Consent Order. He acknowledges and agrees that he has had the opportunity to obtain advice of counsel regarding the matter presently before the Vermont Board and to obtain assistance of counsel in reviewing this Stipulation and Consent Order. Respondent is satisfied as to any and all representation that he may have received.

18. Respondent agrees and understands that by executing this document he is waiving any right to be served with formal charges, to challenge the jurisdiction and continuing jurisdiction of the Board in this matter, to be presented with the evidence against him, to cross-examine any adverse witnesses, to offer evidence of his own in response to a specification of charges, or contest the imposition of conditions upon his Vermont medical license. 26 V.S.A. §§ 1356, 1357-1361; 3 V.S.A. §§ 809 & 814.

19. The parties to this Stipulation and Consent Order agree that appropriate disposition of this matter shall consist of imposition of the conditions set forth herein upon Respondent's Vermont license to practice medicine. Respondent's Vermont medical license shall be designated as "conditioned", and Respondent shall comply fully and in good faith with the terms and conditions of licensure set forth herein, until such time as he may be relieved of all conditions herein by express written order of the Vermont Board of Medical Practice.

20. Respondent understands and agrees that the Vermont Board of Medical Practice must review and approve the proposed terms of this Stipulation and Consent Order. Respondent understands that if the Board does not approve this agreement, none of its terms and conditions shall be binding on him or constitute an admission or evidence as to any alleged unprofessional conduct. Respondent waives any and all claims by him that consideration of this agreement by the Board may have prejudiced any right to a fair and impartial hearing as to any charges of unprofessional conduct, in the event that the Board does not accept this agreement as written.

21. Respondent agrees that he has read and carefully considered all terms and conditions herein. He agrees to accept and be bound by these until such time in the future as he may be expressly relieved of each such condition, in writing, by the Vermont Board of Medical Practice.

22. Upon his petition, any subsequent modification of Respondent's consent agreement

with the New York State Board for Professional Medical Conduct may also be reviewed and considered by the Vermont Board of Medical Practice. Respondent agrees that the Vermont Board of Medical Practice in its sole discretion may decline to accept any such change or modification and may in its sole discretion retain or substitute such other reasonable terms as it may deem necessary to protect the public health, safety, and welfare of patients in the State of Vermont.

23. The parties agree that this Stipulation and Consent Order shall be a public document, shall be made part of Respondent's licensing file, and may be reported to other licensing authorities and/or entities including, but not limited to, the National Practitioner Data Bank and the Federation of State Medical Boards.

24. This Stipulation and Consent Order is subject to review and acceptance by the Vermont Board of Medical Practice and shall not become effective until presented to and approved by the Board. If the Board rejects any part of this Stipulation and Consent Order, the entire agreement shall be considered void. However, should the terms and conditions of this Stipulation and Consent Order be deemed acceptable by the Board, the parties request that the Board enter an order conditioning Respondent's Vermont license to practice medicine as set forth herein.

25. Respondent agrees to be bound by all terms and conditions of this Stipulation and Consent Order. Respondent agrees that the Board of Medical Practice shall retain jurisdiction to enforce all terms and conditions of this Stipulation and Consent Order. Respondent expressly agrees that any failure by him to comply with the terms of this Stipulation and Consent Order may subject him to further action by the Board.

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Dated at Montpelier, Vermont, this 14th day of November, 2005.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: James S. Arisman
JAMES S. ARISMAN
Assistant Attorney General

Dated at Lockport, New York, this 2nd day of November, 2005.

David P. Nichols, M.D.
DAVID P. NICHOLS, M.D.
Respondent, *pro se*

* * *

FOREGOING, AS TO DAVID P. NICHOLS, M.D.
APPROVED AND ORDERED
VERMONT BOARD OF MEDICAL PRACTICE

| | |
|---------------------------------|--------------------------------|
| <u>[Signature]</u> | <u>Detina A. King, M.D.</u> |
| <u>[Signature]</u> | <u>Henry G. Weber</u> |
| <u>Richard J. Freeman, M.D.</u> | <u>William H. Stouch, M.D.</u> |
| <u>[Signature]</u> | <u>Ellen F. [Signature]</u> |
| <u>Margaret Fink Martin</u> | <u>[Signature]</u> |
| <u>Shamir T. Fial</u> | |

DATED: 11/14/05

ENTERED AND EFFECTIVE: December 1, 2005

NICHOLS 10-05; By James S. Arisman, AAG/VT; Not Approved by BMP Until Executed Above

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Exhibit 1

NEW YORK STATE DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER
OF
DAVID P. NICHOLS, M.D.

CONSENT
AGREEMENT
AND
ORDER

David P. Nichols, M.D., Respondent, representing that all of the following statements are true, deposes and says:

That on or about October 28, 1977, I was licensed to practice as a physician in the State of New York, and issued License No. 132972 by the New York State Education Department.

My current address is 7252 Woodhaven Drive, Lockport, New York 14094, and I will advise the Director of the Office of Professional Medical Conduct of any change of address.

I understand that the New York State Board for Professional Medical Conduct has charged me with one specification of professional misconduct.

A copy of the Statement of Charges, marked as Exhibit "A", is attached to and part of this Consent Agreement.

I agree to plead guilty to the First, Fourth, Seventh and Tenth Specifications, in full satisfaction of the charges against me, and agree to the following penalty:

Pursuant to § 230-a(3) of the Public Health Law of the State of New York, I shall be permanently restricted from performing nerve conduction studies.

Pursuant to §230-a(9) of the Public Health Law of the State of New York, I shall be placed on probation for a period of thirty-six (36) months, subject to the terms set forth in Exhibit "B."

And I further agree that the Consent Order shall impose the following conditions:

- a. That Respondent shall maintain current registration of licensure with the New York State Education Department Division of Professional Licensing Services (except during periods of actual suspension), and shall pay all registration fees. This condition shall take effect thirty (30) days after the Consent Order's effective date and will continue so long as Respondent remains licensed in New York State; and
- b. That Respondent shall cooperate fully with the Office of Professional Medical Conduct (OPMC) in its administration and enforcement of this Order and in its investigations of matters concerning Respondent. Respondent shall respond in a timely manner to all OPMC requests for written periodic verification of Respondent's compliance with this Order. Respondent shall meet with a person designated by the Director of OPMC, as directed. Respondent shall respond promptly and provide all documents and information within Respondent's control, as directed. This condition shall take effect upon the Board's issuance of the Consent Order and will continue so long as Respondent remains licensed in New York State; and

I stipulate that my failure to comply with any conditions of this Order shall constitute misconduct as defined by New York State Education Law §6530(29).

I agree that if I am charged with professional misconduct in future, this Consent Agreement and Order shall be admitted into evidence in that proceeding.

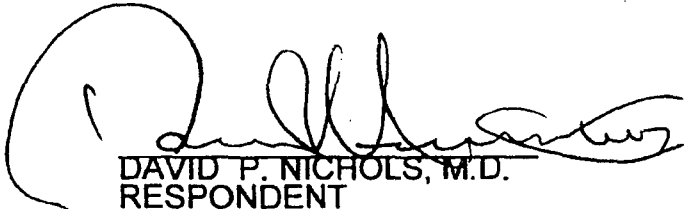
I ask the Board to adopt this Consent Agreement.

I understand that if the Board does not adopt this Consent Agreement, none of its terms shall bind me or constitute an admission of any of the acts of alleged misconduct; this Consent Agreement shall not be used against me in any way and shall be kept in strict confidence; and the Board's denial shall be without prejudice to the pending disciplinary proceeding and the Board's final determination pursuant to the Public Health Law.

I agree that, if the Board adopts this Consent Agreement, the Chair of the Board shall issue a Consent Order in accordance with its terms. I agree that this Order shall take effect upon its issuance by the Board, either by mailing of a copy of the Consent Order by first class mail to me at the address in this Consent Agreement, or to my attorney by certified mail, OR upon facsimile transmission to me or my attorney, whichever is first.

I ask the Board to adopt this Consent Agreement of my own free will and not under duress, compulsion or restraint. In consideration of the value to me of the Board's adoption of this Consent Agreement, allowing me to resolve this matter without the various risks and burdens of a hearing on the merits, I knowingly waive my right to contest the Consent Order for which I apply, whether administratively or judicially, I agree to be bound by the Consent Order, and ask that the Board adopt this Consent Agreement.

DATED: 3/10/05


DAVID P. NICHOLS, M.D.
RESPONDENT

The undersigned agree to Respondent's attached Consent Agreement and to its proposed penalty, terms and conditions.

DATED: 3/16/05

By: 

ROACH, BROWN, MCCARTHY & GRUBER, P.C.

JOSEPH V. MCCARTHY, ESQ.
Attorney for Respondent

DATED: February 25, 2005


JEFFREY J. CONKLIN, ESQ.
ASSOCIATE COUNSEL
Bureau of Professional Medical Conduct

DATED: May 9, 2005


DENNIS J. GRAZIANO
Director
Office of Professional Medical Conduct

STATE OF NEW YORK : DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER
OF
DAVID P. NICHOLS, M.D.

STATEMENT
OF
CHARGES

DAVID P. NICHOLS, M.D., the Respondent, was authorized to practice medicine in New York State on or about October 28, 1977, by the issuance of license number 132972 by the New York State Education Department. The Respondent is currently registered with the New York State Education Department to practice medicine.

FACTUAL ALLEGATIONS

- A. Respondent provided medical care to Patient A (hereinafter identified in the attached Appendix) from August 24, 1998, through October 29, 1998, at said Respondent's office, 5875 Transit Road, Lockport, New York, and at Lockport Memorial Hospital, Lockport, New York. Respondent's care and treatment of Patient A did not meet minimum standards of care in that:
1. Respondent failed to perform adequate nerve conduction studies of Patient A;
 2. Respondent diagnosed bilateral ulnar entrapment at the elbows based upon inadequate nerve conduction studies; and
 3. Respondent performed bilateral surgical releases without the appropriate indications for such procedures.

B. Respondent provided medical care to Patient B (hereinafter identified in the attached Appendix A) from December 16, 1998, through March 20, 1999, at said Respondent's office and at Lockport Memorial Hospital. Respondent's care and treatment of Patient B did not meet minimum standards of care in that:

1. Respondent failed to perform adequate nerve conduction studies of Patient B;
2. Respondent diagnosed bilateral carpal tunnel syndrome based upon inadequate nerve conduction studies; and
3. Respondent performed bilateral carpal tunnel surgeries without the appropriate indications for such procedures.

C. Respondent treated Patient C (hereinafter identified in the attached Appendix) from February 24, 1999, through May 19, 1999, at said Respondent's office and at Lockport Memorial Hospital. Respondent's care and treatment of Patient C did not meet minimum standards of care in that:

1. Respondent failed to perform adequate nerve conduction studies of Patient C;
2. Respondent diagnosed right-sided carpal tunnel syndrome based upon inadequate nerve conduction studies; and
3. Respondent performed carpal tunnel surgery without the appropriate indications for such procedure.

D. Respondent treated Patient D (hereinafter identified in the attached Appendix) from November 23, 1998, through December 21, 1998, at said Respondent's office and at Lockport Memorial Hospital. Respondent's care and treatment of Patient D did not meet minimum standards of care in that:

1. Respondent failed to perform adequate nerve conduction studies of Patient D; and
2. Respondent diagnosed bilateral carpal tunnel syndrome based upon inadequate nerve conduction studies;

SPECIFICATIONS OF CHARGES
FIRST THROUGH ELEVENTH SPECIFICATIONS
(Negligence on More than One Occasion)

Respondent is charged with professional misconduct as defined by New York Education Law § 6530(3) by practicing the profession of medicine with negligence on more than one occasion as alleged in the facts two or more of the following:

1. The facts set forth in Paragraphs A and A1;
2. The facts set forth in Paragraphs A and A2;
3. The facts set forth in Paragraphs A and A3;
4. The facts set forth in Paragraphs B and B1;
5. The facts set forth in Paragraphs B and B2;
6. The facts set forth in Paragraphs B and B3;
7. The facts set forth in Paragraphs C and C1;
8. The facts set forth in Paragraphs C and C2;
9. The facts set forth in Paragraphs C and C3;
10. The facts set forth in Paragraphs D and D1; and
11. The facts set forth in Paragraphs D and D2.

DATED: March 22, 2005
Albany, New York



Peter D. Van Buren
Peter D. Van Buren
Deputy Counsel
Bureau of Professional Medical Conduct

EXHIBIT "B"

Terms of Probation

1. Respondent's conduct shall conform to moral and professional standards of conduct and governing law. Any act of professional misconduct by Respondent as defined by New York State Education Law §6530 or §6531 shall constitute a violation of probation and may subject Respondent to an action pursuant to New York State Public Health Law §230(19).
2. Respondent shall maintain current registration of licensure with the New York State Education Department Division of Professional Licensing Services (except during periods of actual suspension), and shall pay all registration fees.
3. Respondent shall provide the Director, Office of Professional Medical Conduct (OPMC), Hedley Park Place, 433 River Street Suite 303, Troy, New York 12180-2299 with the following information, in writing, and ensure that such information is kept current: a full description of Respondent's employment and practice; all professional and residential addresses and telephone numbers within and outside New York State; and all investigations, charges, convictions or disciplinary actions by any local, state or federal agency, institution or facility, within thirty (30) days of each action.
4. Respondent shall cooperate fully with, and respond in a timely manner to, OPMC requests to provide written periodic verification of Respondent's compliance with the terms of this Consent Order. Upon the Director of OPMC's request, Respondent shall meet in person with the Director's designee.
5. Respondent's failure to pay any monetary penalty by the prescribed date shall subject Respondent to all provisions of law relating to debt collection by New York State, including but not limited to: the imposition of interest, late payment charges and collection fees; referral to the New York State Department of Taxation and Finance for collection; and non-renewal of permits or licenses [Tax Law section 171(27)]; State Finance Law section 18; CPLR section 5001; Executive Law section 32].
6. The probation period shall toll when Respondent is not engaged in active medical practice in New York State for a period of thirty (30) consecutive days or more. Respondent shall notify the Director of OPMC, in writing, if Respondent is not currently engaged in, or intends to leave, active medical practice in New York State for a consecutive thirty (30) day period. Respondent shall then notify the Director again at least fourteen (14) days before returning to active practice. Upon Respondent's return to active practice in New York State, the probation period will resume and Respondent shall fulfill any unfulfilled probation terms.
7. The Director of OPMC may review Respondent's professional performance. This review may include but shall not be limited to: a review of office records, patient records and/or hospital charts; and interviews with or periodic visits with Respondent and staff at practice locations or OPMC offices.
8. Respondent shall maintain complete and legible medical records that accurately reflect the evaluation and treatment of patients and contain all information required by State rules and regulations concerning controlled substances.

PRACTICE MONITOR

9. Within thirty days of the effective date of the order, Respondent shall practice medicine only when monitored by a licensed physician, board certified in an appropriate specialty, ("practice monitor") proposed by Respondent and subject to the written approval of the Director of OPMC.
 - a. Respondent shall make available to the monitor any and all records or access to the practice requested by the monitor, including on-site observation. The practice monitor shall visit Respondent's medical practice at each and every location, on a random unannounced basis at least monthly and shall examine a selection (no fewer than 20) of records maintained by Respondent, including patient records, prescribing information and office records. The practice monitor shall also review any and all office and hospital records regarding carpal tunnel surgeries and ulnar surgical releases performed by the Respondent. The review will determine whether the Respondent's medical practice is conducted in accordance with the generally accepted standards of professional medical care. Any perceived deviation of accepted standards of medical care or refusal to cooperate with the monitor shall be reported within 24 hours to OPMC.
 - b. Respondent shall be solely responsible for all expenses associated with monitoring, including fees, if any, to the monitoring physician.
 - c. Respondent shall cause the practice monitor to report quarterly, in writing, to the Director of OPMC.
 - d. Respondent shall maintain medical malpractice insurance coverage with limits no less than \$2 million per occurrence and \$6 million per policy year, in accordance with Section 230(18)(b) of the Public Health Law. Proof of coverage shall be submitted to the Director of OPMC prior to Respondent's practice after the effective date of this Order.
10. Respondent shall comply with this Order and all its terms, and shall bear all a associated compliance costs. Upon receiving evidence of noncompliance with, or violation of, these terms, the Director of OPMC and/or the Board may initiate a violation of probation proceeding, and/or any other such proceeding authorized by law, against Respondent.